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IN THE

Supreme Court of the United States

October Term, 1963
No. 888

JOHN KASLOW, Individually and Trading and Doing Business as J. C. MARTIN CO. and THE D. A. SALES COMPANY,

Petitioner

v.

PAUL RAND DIXON, PHILIP ELMAN, EVERETTE MacINTYRE, SIGURD ANDERSON, and JOHN A. REILLY, Individually and Collectively as the FEDERAL TRADE COMMISSION

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT.

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TABLE OF CONTENTS

	PAGE
PETITION FOR WRIT OF CERTIORARI:	
A. Opinions Below	2
B. Grounds on Which This Court's Jurisdiction Is Invoked	2
C. Questions Presented for Review	3
D. Statutes and Constitutional Provisions Involved	4
E. Statement of the Case	6
F. Reasons Why the Writ Should Be Granted:	
1. The Complaint Stated a Good Cause of Action Over Which the District Court Had Jurisdiction	15
2. The Courts Below Have Grossly Erred in Allowing Dismissal of an Action of Great Public Importance Seeking To Enjoin Patently Illegal and Unfair Acts on the Part of the Federal Trade Commission	22
3. Petitioner Should Have Been Allowed To Invoke Judicial Aid in a Sister Circuit in Order To Protect the Integrity of the Seventh Circuit's Judgment and To Preserve the Law of the Case by Which, Until That Circuit Court's Further Order, All Parties Remain Bound, Without Being Required First To Defend the Merits of Defendants' Lawlessly Reinstituted Proceedings	29
4. The Lower Courts' Successive Failure To Inform Petitioner, by Opinion or Otherwise, of the Basis for Dismissal of His Suit, Constitutes or at Least Approaches a Deprivation of Due Process of Law	33
G. Conclusion	35

TABLE OF CITATIONS

CASES:

Adams v. International Brotherhood, 262 F. 2d 835 (1959) (C.A. 10) 16

Alaniz v. United States, 257 F. 2d 108, 1958 (C.A. 10) 22

Bartron v. Delaware River Joint Toll Bridge Commission, 216 F. 2d 717, 1954 (C.A. 2) 18

Bohn Aluminum Corp. v. Storm King Corp., 303 F. 2d 425, 1962 (C.A. 6) 24

Booth v. Barber Transportation Co., 256 F. 2d 927, 1958 (C.A. 8) 22, 23

Bowers v. Calkins, 84 F. Supp. 272, 1949 (D.C., N.H.) 18

Corley v. Life & Casualty Ins. Co., 296 F. 2d 449, App. D.C. , 1961 24

Deering-Milliken, Inc. v. Johnston, 295 F. 2d 856, 1961 (C.A. 4) 19, 21, 30, 31

Henry v. Ford Motor Co., 269 F. 2d 18, 1959 (C.A. 6) 22

Hiern v. St. Paul-Mercury Indemnity Co., 262 F. 2d 526, 1959 (C.A. 5) 22

International Union of Mine, Mill & Smelter Workers v. Eagle-Pitcher Co., 65 S. Ct. 1166, 325 U. S. 335, 89 L. Ed. 1649, 1945 32

Leedom v. Kyne, 358 U.S. 184, 79 S. Ct. 180, 3 L. Ed. 2d 210, 1958 ..... 20, 21, 30, 31

Manischewitz Food Products v. Rosenberg, 9 F.R.D. 115, 1949 (E.D., Pa.) 18

N.L.R.B. v. Hopwood Co., 104 F. 2d 302, 1939 (C.C.A. 2) 25, 26

Poller v. Columbia Broadcasting System, 368 U.S. 464, 82 S. Ct. 486, 7 L. Ed. 2d 458, 1962 22

Snyder v. Hillegeist, 249 F. 2d 649, 100 App. D.C. 368, 1957 22
Stark v. Wickard, 321 U.S. 288, 64 S. Ct. 559, 88 L. Ed. 733 (1944) 16
The Wolf Corporation v. Securities and Exchange Commission, Appeal No. 17,355, F. 2d , App. D.C. , (decided Feb. 14, 1963) 17
United States v. United Marketing Assn., 291 F. 2d 851, 1961 (C.A. 8) 24

Acts:

Administrative Procedure Act, 5 U.S.C. §1005(a), Sec. 6(a) 19, 31
Federal Trade Commission Act of 1914:
15 U.S.C. Sec. 45(i), Sec. 5 26
15 U.S.C. Sec. 45(c), Sec. 5(c) 4, 9, 18, 21, 34
15 U.S.C. Sec. 45(d), Sec. 5(d) 25
15 U.S.C. Sec. 41, Sec. 1 8
Judicial Code:
28 U.S.C. 1254(2) 2
28 U.S.C. 1332 ..... 7, 17
28 U.S.C. 1337 ..... 5, 6, 8, 16, 31
Labor Relations Act:
29 U.S.C. §159(b), Sec. 9(b) 20
29 U.S.C. §160(f), Sec. 10(f) 20

Miscellaneous:

1 Beer, Federal Trade Law and Practice (1942 Ed.) 480, 484, Sec. 178 ..... 25, 26
50 C.J.S., Judgments:
Sec. 712, p. 174 32
Sec. 818, p. 372 31
Sec. 846, p. 420 33

Commission's Rules of Practice:
Par. 5.7, 16 C.F.R. §3.27(b) ... 27
16 C.F.R. §3.27(e) ... 28
Rules of Civil Procedure:
Rule 12 ... 7
Rule 52(a) ... 34
Rule 56 ... 7, 8
United States Constitution, Fifth Amendment ... 5

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

To the Honorable, the Chief Justice and Justices of the Supreme Court of the United States:

The petitioner, John Kaslow, respectfully prays that a writ of certiorari issued to review the judgment of the United States Court of Appeals for the District of Columbia Circuit entered December 6, 1963, at its No. 17,819, affirming a summary judgment for defendant-respondents entered April 3, 1963, by the United States District Court for the District of Columbia at that court's No. 2787-62.

Questions Presented

A. OPINIONS BELOW

No opinions in connection with the judgments sought to be reviewed have been delivered either by the District Court or by the United States Court of Appeals.

B. GROUNDS ON WHICH THIS COURT'S JURISDICTION IS INVOKED

1. The judgment of the Court of Appeals for the District of Columbia Circuit sought to be reviewed is dated December 6, 1963, and was entered on that date.

2. There has been no order respecting rehearing or (as of the date this petition was prepared for printing) extending the time within which to petition for certiorari.

3. Jurisdiction to review the judgment by writ of certiorari is conferred on the Supreme Court by Section 1254(2) of the Judicial Code, 28 U.S.C. 1254(2).

Statutes and Constitutional Provisions Involved

C. QUESTIONS PRESENTED FOR REVIEW

1. Did petitioner's complaint state a cause of action the subject matter of which was within the District Court's jurisdiction?

2. Where, under guise of a new docket number ostensibly connected to a new administrative proceeding, the Federal Trade Commission has sought to reopen a prior proceeding in which, in 1957, a competent Court of Appeals conclusively vacated and set aside the Commission's cease and desist order against the same respondents and covering the same issues and subject matter, should the District Court have granted summary judgment for defendants in your petitioner's suit to enjoin the Commission, from prosecuting its "new" proceeding without that Court of Appeals' leave?

3. Has your petitioner been accorded procedural due process of law where neither the District Court nor the Court of Appeals for the District of Columbia Circuit have entered an opinion or by any other means indicated the basis of dismissal of your petitioner's complaint, or whether such basis was jurisdictional or nonjurisdictional?

D. STATUTES AND CONSTITUTIONAL PROVISIONS INVOLVED

The first and second questions presented principally involve Section 5(c) of the Federal Trade Commission Act of 1914, 15 U.S.C. Sec. 45(c), as amended, which provides (in part here material):

> "Any person, partnership, or corporation required by an order of the Commission to cease and desist from using any method of competition or act or practice may obtain a review of such order in the court of appeals of the United States, within any circuit where the method of competition or the act or practice in question was used or where such person, partnership, or corporation resides or carries on business, by filing in the court, within sixty days from the date of the service of such order, a written petition praying that the order of the Commission be set aside . . . Upon such filing of the petition the court shall have jurisdiction of the proceeding and of the question determined therein concurrently with the Commission until the filing of the record and shall have power to make and enter a decree affirming, modifying, or setting aside the order of the Commission, and enforcing the same to the extent that such order is affirmed and to issue such writs as are ancillary to its jurisdiction or are necessary in its judgment to prevent injury to the public or to competitors pendente lite. The findings of the Commission as to the facts, if supported by evidence, shall

be conclusive. To the extent that the order of the Commission is affirmed, the court shall thereupon issue its own order commanding obedience to the terms of such order of the Commission . . . The judgment and decree of the court shall be final, except that the same shall be subject to review by the Supreme Court upon certiorari, as provided in Section 347 of Title 28."

Insofar as the actions of the District Court and of the Court of Appeals here complained of may (for anything your petitioner knows) rest on those courts' belief that the District Court lacked jurisdiction of the subject matter of your petitioner's action. The first question presented also involves Section 1337 of the Judicial Code, 28 U.S.C. Sec. 1337, which provides:

"The district courts shall have original jurisdiction of any civil action or proceeding arising under any Act of Congress regulating commerce or protecting trade and commerce against restraints and monopolies."

The third question presented involves the Fifth Amendment to the United States Constitution insofar as it provides:

". . . nor shall any person . . . be deprived of life, liberty or property, without due process of law . . ."

E. STATEMENT OF THE CASE*

The Procedural History

This case began on August 31, 1962, when petitioner, John Kaslow, filed a complaint sounding in equity and basing jurisdiction on 28 U.S.C. §1337, in the District Court for the District of Columbia at Civil Action 2787-62. He sought in his action to enjoin the five then** members of the Federal Trade Commission from further conducting certain administrative proceedings against him at their Docket 8520. The basis of petitioner's claim for relief in the District Court, and the averments of his complaint, will be set forth below.

After the requisite time had elapsed, petitioner served interrogatories (28a) on defendants and also requests for admissions (34a). He later from time to time as the case progressed added supplemental interrogatories (29a, 33a) and supplemental requests for admissions (36a, 37a).

---

* References in this petition consisting of parenthesized numerals followed by "a" are to the record as printed in the form of a joint appendix for the use of the Court of Appeals for the District of Columbia Circuit.

** A. Leon Higginbotham, Jr., was later substituted for William C. Kern, one of the original defendants, after the latter's term of office expired (57a). Commissioner Higginbotham has, in turn, resigned from that office since entry of the Court of Appeals' judgment of December 6, 1963, and has been succeeded by John R. Reilly. The caption to this petition reflects the latter change.

At the time the District Court entered its summary judgment for defendants on April 3, 1963, there were outstanding a total of twenty-four interrogatories and twenty requests for admission, to all of which defendants had not responded pending decision of their motions for summary disposition of the cause. These lines of discovery were never answered. The District Court treated them as moot (64a) at the time it found for defendants on April 3, 1963. Also so treated was a motion by petitioner for discovery and production of documents (39a) to which defendants had objected (41a) while the cause was at issue.

After being served with the complaint, defendants moved for dismissal or, alternatively, for summary judgment (45a). Their motion did not specify whether Rule 12, Rule 56, or other Rule of Civil Procedure, was being invoked. The parties then filed statements and counterstatements, respectively, of the material facts not in dispute (42a, 58a). Petitioner's counterstatement was once amended (62a). These statements showed substantial differences to exist as to what was material and not in issue. Petitioner also moved (61a) to amend his complaint so as additionally to predicate the court's jurisdiction over the subject matter on diversity of citizenship, 28 U.S.C. §1332, and so as additionally to aver that defendant's conduct, unless enjoined, would deprive him of due process of law. A motion by petitioner for preliminary injunction was never brought to formal hearing, since defendants elected to stay their own hand until the District Court would dispose of the suit.

Following briefs and oral argument, the District Court (Matthews, J.) on March 28, 1963, signified that defendants' motion for summary judgment would be granted. An order to this effect was submitted and entered by the

District Court on April 3, 1963 (63a).* It was unaccompanied by findings of fact, conclusions of law, or opinion of any kind. Petitioner on May 2, 1963, filed notice of appeal to the Court of Appeals for the District of Columbia Circuit (64a).

The Summary of the Record

Apart from the procedural history, a short summary of the record passed on by the District Court may help to delineate the questions presented in this petition.

Petitioner's complaint (5a et seq.) averred, in substance, that he had New York citizenship diverse to that of each defendant; that defendants collectively comprised the Federal Trade Commission, created by Section 1 of the Federal Trade Commission Act of 1914, 15 U.S.C. §41; that the matter in controversy, exclusive of interest and costs, was in excess of $10,000; and that the action was brought under Section 1337 of the Judicial Code, 28 U.S.C. §1337, with right reserved to amend to predicate jurisdiction on the additional ground of diversity of citizenship.**

* The District Court's order both granted defendants' motion for summary judgment and dismissed the action (63a). As with the motion, the order did not indicate whether action was being taken, under Rule 12, F. R. C. P., or Rule 56; it did not even indicate whether the basis for the order was lack of jurisdiction over the subject matter of the action, failure on the part of petitioner to state a cause of action on which relief could be granted, or other basis.

** As already stated, the complaint was in fact later amended so as also to predicate jurisdiction on the ground of diversity (61a).

[Continuation of "The Procedural History", page 8]

On May 7, 1963, the District Court entered an order (64a) denying a stay pending appeal. Thereafter, on May 20, after oral argument held May 16, the Court of Appeals (Danahar, Burger, and Wright, JJ.) entered its own order denying such stay "upon taking into account the representations of appellees that [their] pending complaint in Docket 8520 presents different allegations from those in Docket 6145 and will involve proof of facts and circumstances dealing with appellant's operations since 1957." Thereafter, on June 6, 1963, petitioner sought a stay from this Court. The application was opposed by the Solicitor General and was denied on June 15, 1963, without opinion.

Oral argument on the merits of petitioner's case was heard by the Court of Appeals on November 14, 1963 (Bazelon, C. J., Washington and Bastian, JJ.). On December 6, 1963, that court entered its judgment affirming that of the District Court. The judgment was not accompanied by an opinion or any other indication of the basis for its entry. This petition has followed.

[Turn now to "**The Summary of the Record**" hereunder.]

In sum, the complaint went on to aver that defendants' predecessors in office had in 1953 served petitioner and certain others then associated with him, with a complaint at their Docket 6145 alleging that he was selling articles of merchandise in commerce by means involving a game of chance and thereby constituting a lottery; that that complaint had alleged that these sales contravened the public interest and were an unfair method of competition from which petitioner should be ordered to cease and desist; that petitioner contested these allegations before the Commission but, nevertheless, in June of 1956, was ordered by it to cease and desist from these means of making sales; that petitioners thereupon petitioned the Court of Appeals for the Seventh Circuit at its No. 11,859 to review the cease and desist order as provided in Section 5(c) of the Federal Trade Commission Act, 15 U.S.C. §45(c); that that Court of Appeals held full hearing on the merits of the case, having before it a complete record made in the Commission proceedings, and principally considered whether the means used by petitioner to effect his sales in commerce constituted a lottery or were otherwise unlawful or transgressive of public policy; that on April 3, 1957 that Court of Appeals entered a judgment and decree vacating and setting aside the cease and desist order, and expressly holding in an accompanying opinion (J. C. Martin Corp. v. Federal Trade Commission, 242 F. 2d 530) that the means used by petitioner to effect sales were not a lottery and were not otherwise unlawful or in contravention of public policy; and that the Commission, although duly served with this judgment, accompanying opinion, and ensuing mandate, never sought rehearing or review of said judgment, never sought clarification thereof (if any were needed), and never sought

relief therefrom. Defendant Anderson and original defendant Kern, it was averred, were members of the Commission, and defendant Dixon a member of its trial staff, at the time the mandate was received, so as to charge them with knowledge of its intendment, meaning, and effect.

The complaint went on to aver that in 1961 defendants began an investigation of petitioner's business methods ostensibly to determine whether their advertising was false and misleading, at the same time disclaiming any intention of reinstituting their earlier proceedings; at that time they learned or should have learned that petitioner's way of doing business had not substantially changed since Appeal 11,859 had been heard and decided. Nevertheless, it was averred, defendants in July, 1962, while still bound by the mandate of the Court of Appeals for the Seventh Circuit and without that Court's leave, caused petitioner to be served with another administrative complaint at their Docket 8520 which repeated in attenuated but substantially identical terms the prior discredited averments of their complaint at Docket 6145; which made no reference to said prior complaint, and failed to aver any facts or circumstances which had changed since the former complaint's issuance and disposition; which in no way averred false or misleading advertising; and which raised no issue not falling squarely within the ambit of the decision at Appeal 11,859. Copies of the Commission complaints at Dockets 6145 and 8520 were attached to the complaint as Exhibits "A" (14a et seq.) and "B" (22a et seq.), respectively.

Petitioner further alleged that defendants' act in having issued and served their complaint at Docket 8520

amounted to the reinstitution of the proceedings at Docket 6145 which had been conclusively terminated in his favor; that such reinstitution was without leave of the Court of Appeals and violated its mandate; that it would be unjust and inequitable to require him again to defend those proceedings at the expense of time, effort, and money which could ill be afforded; that defendants had promiscuously publicized the issuance of their complaint at Docket 8520 and threatened further to do so, to petitioner's detriment in his relations with suppliers, customers, and others in the channels of trade; that the continued pendency of the proceedings would operate to deprive him of needed lines of credit required for the efficient conduct of his business; that he would also be disabled from stocking merchandise and preparing sales catalogues in needed quantities; and that petitioner was without assurance that defendants would grant, act on, or even consider a motion which he had made, without prejudice, in the context of their own proceedings requesting them to dismiss their complaint for the reasons stated.

Petitioner's prayer for relief asked for orders temporarily to restrain and, after hearing, preliminarily to enjoin the defendants from further conducting proceedings at their Docket 8520 *pendente lite*; to enjoin further publicity; and, after hearing, to enjoin permanently any further proceedings "without leave of the Court of Appeals for the Seventh Circuit on a showing that the public interest, within the meaning of Section 5 of the Federal Trade Commission Act, so requires".

Defendants' motion for dismissal of this complaint, or, alternatively, for summary judgment (45a) asserted: (1) the District Court's lack of jurisdiction over the

subject matter; (2) petitioner's failure to exhaust what was said to be "an adequate legal remedy"; (3) a failure to state a claim to justify relief; and (4) defendants' right to judgment as a matter of law on material facts said not to be in issue. Attached to the motion was an affidavit by one of defendants' staff attorneys which in turn annexed as exhibits this plaintiff's motion filed at their Docket 8520 to dismiss those proceedings (47a), and the affiant's answer to that motion (50a). Nothing in any of these documents rebutted those averments of petitioner's complaint which had alleged the complaint at Docket 8520 to be merely reiterative of that at Docket 6145; or rebutted petitioner's averment that his way of doing business had not substantially changed since 1957 and before; or rebutted petitioner's averments that defendants' complaint at Docket 8520 had not averred such or any other changes in facts or circumstances; or rebutted petitioner's averment that defendants had not sought leave of court to reinstitute the proceedings at Docket 6145 and were in violation of the Court of Appeals' 1957 mandate. In essence, the affidavit and exhibits thereto did no more than show that the petitioner had, without prejudice to his right to have the proceedings at Docket 8520 enjoined, moved defendants to dismiss their own proceedings, and that they had not done so.

Defendants also filed their version of material facts as to which (they said) no genuine issue existed (42a). They admitted many of the averments of the complaint; however, they incorrectly or inaccurately stated as facts

(1) that the 1957 Court of Appeals decision had vacated and set aside their order because "the element of prize had not been established" (45a). (The Court

of Appeals' opinion at 242 F. 2d 530 2nd that record discloses as the basis for that Court's action not that defendants had not *established* the element of prize, but that such element *did not inhere* in plaintiff's sales method.)

(2) that defendants' complaint at Docket 8520 had charged plaintiff with "an additional violation of the . . . Act . . . *not* set forth in the . . . complaint in Docket 6145, viz., the sale of merchandise by means of a chance or gaming device" (44a). (A comparison of the two administrative complaints discloses that "chance or gaming device" is used interchangeably with "game of chance, gift enterprise, or lottery scheme".)

(3) that the complaint t Docket 8520 "includes a period of time subsequent to that covered by the complaint at Docket 6145" (44a). (Each complaint shows on its face that it is indefinite as to time (16a, immediately following "paragraph two", and 23a, immediately following "paragraph two").).

(4) that "parties in the two . . . proceedings appear to be different" (44a). (The fact is that while there were respondents to the proceedings at Docket 6145 other than the parties respondent at Docket 8520, there is no party respondent in the later proceedings who or which was not also a party respondent in the earlier proceeding (see petitioner's counterstatement of material facts, paragraphs 16, 16-A and 17 at 61a and 63a).)

The true and controlling facts were stated in petitioner's counterstatement of material facts (58a et

seq.) and by those averments of the complaint which were explicitly pleaded and not denied. Moreover, petitioner's interrogatories and requests for admissions (see, in particular, requests 12 and 13, 36a and 37a) sought concessions that there was no material difference between "game of chance" as used in various places in the complaint at Docket 6145 and "chance or gaming device" as used in defendants' more recent complaint. The same discovery pleadings invited defendants to state what, if any, genuine differences between these two complaints there might be (29a-33a). Defendants never responded to these lines of inquiry.

On May 7, 1963, the District Court entered an order (64a) denying a stay pending appeal. Thereafter, on May 20, after oral argument held May 16, the Court of Appeals (Danahar, Burger, and Wright, JJ.) entered its own order denying such stay "upon taking into account the representations of appellees that [their] pending complaint in Docket 8520 presents different allegations from those in Docket 6145 and will involve proof of facts and circumstances dealing with appellant's operations since 1957." Thereafter, on June 6, 1963, petitioner sought a stay from this Court. The application was opposed by the Solicitor General and was denied on June 15, 1963, without opinion.

Oral argument on the merits of petitioner's case was heard by the Court of Appeals on November 14, 1963 (Bazelon, C.J., Washington and Bastian, JJ.). On December 6, 1963, that court entered its judgment affirming that of the District Court. The judgment was not accompanied by an opinion or any other indication of the basis for its entry. This petition has followed.

F. REASONS WHY THE WRIT SHOULD BE GRANTED

In advancing reasons for grant of the writ, petitioner is handicapped by the fact that neither the District Court nor the Court of Appeals, by entry of opinions or otherwise, have stated the reasons why those courts have, respectively, entered summary judgment for the defendants and affirmed such entry. It is petitioner's position, to be set forth in more detail below, that under the instant circumstances the failure of the lower courts to inform him of the basis of their action, in itself constitutes or approaches a denial of procedural due process of law. Initially, however, petitioner feels obliged to demonstrate, first, that his complaint in the District Court stated a good cause of action, the subject matter of which fell within that court's jurisdiction, and, second, that the District Court has grossly erred in summarily dismissing an action of great public importance which has sought to enjoin patently illegal and unfair acts on the part of an important Federal administrative and quasi-judicial agency.

1. The Complaint Stated a Good Cause of Action Over Which the District Court Had Jurisdiction

The District Court's election to dispose of this action by granting summary judgment for defendants in addition to entering a judgment of dismissal for which defendants

had alternatively moved, gives petitioner reason to think that the District Court concluded that it had jurisdiction of the subject matter and was obliged to dispose of the case on non-jurisdictional grounds. Against the possibility, however, that defendants will urge in this Court, as they have urged below, that the District Court lacked jurisdiction, petitioner will briefly state why, in his view, there was no lack of jurisdiction there.

(1) The action arose under "an Act of Congress regulating commerce", etc., and jurisdiction was therefore conferred by Section 1337 of the Judicial Code, 28 U.S.C. §1337.

As already stated, the complaint as originally filed predicated jurisdiction of the subject matter on Section 1337 of the Judicial Code, 28 U.S.C. §1337:

> "The district courts shall have original jurisdiction of any civil action or proceeding arising under any Act of Congress regulating commerce or protecting trade and commerce against restraints and monopolies."
>
> (Act of June 25, 1948, c. 646, 62 Stat. 931)

It is well settled that the general equity jurisdiction of the District Court for the District of Columbia extends to suits to enjoin assertedly illegal acts of Government officials taken under color of Federal statutes based on the commerce clause: *Stark v. Wickard*, 321 U.S. 288, 64 S. Ct. 559, 88 L. Ed. 733, 1944. The test of whether the statute gives jurisdiction in the particular case is whether the action concerns what the courts have termed the validity, construction, or enforcement of a statute regulating commerce: *Adams v. International Brotherhood*, 262 F. 2d

835, 1959 (C.A. 10). In the recent case of *The Wolf Corporation v. Securities and Exchange Commission*, Appeal No. 17,355, F. 2d , App. D.C. , decided February 14, 1963, plaintiff had unsuccessfully sought in the District Court an order to enjoin the Commission from issuing a "stop order" designed to bar it from selling certain securites to the public. The Court of Appeals affirmed on the merits the District Court's denial of relief, but at the same time squarely rejected appellee's contention that the District Court had lacked jurisdiction over the subject matter:

> "Appellant contends that absent judicial review until after the agency hearing on the merits irreparable injury would result. It points to the effect that a stop order would have on appellant's ability to secure capital and claims that the stop order would have to be set aside on appeal because of a denial of due process by the Commission. *This allegation would seem to be sufficient to invoke the equity jurisdiction of the District Court under 28 U.S.C. §1337.*"
>
> (Emphasis supplied.)

An averment almost identical to that noted by the Court of Appeals in *Wolf* is contained in the instant complaint (11a-12a). Additionally, the complaint as amended claims denial of due process of law (62a).

(2) Jurisdiction was additionally conferred on the basis of diversity of citizenship pursuant to Section 1332 of the Judicial Code, 28 U.S.C. §1332.

The instant complaint as originally filed averred (6a) that each defendant was a citizen of a state other than plaintiff's, and that the amount in controversy ex-

ceeded $10,000. As amended (61a), it expressly predicated jurisdiction on diversity of citizenship.

It is established that the District Court's diversity jurisdiction extends to suits to enjoin acts which would irreparably harm or interfere with plaintiff's business, good will, channels of trade, or communications: *Manischewitz Food Products v. Rosenberg*, 9 F. R. D. 115, 1949 (E.D., Pa.); *Bowers v. Calkins*, 84 F. Supp. 272, 1949 (D.C., N.H.); *Bartron v. Delaware River Joint Toll Bridge Commission*, 216 F. 2d 717, 1954 (C.A. 2).

(3) The District Court's jurisdiction was not ousted by the availability of judicial review pursuant to Section 5(c) of the Federal Trade Commission Act of a decision by defendants which might be adverse to petitioner.

Defendants' principal challenge to the District Court's jurisdiction lay in their contention that the provisions of Section 5(c) of the Federal Trade Commission Act, 15 U.S.C. §45(c), authorizing review by a Court of Appeals of any Commission cease and desist order which may be entered against this petitioner are exclusive with respect to all judicial relief and preclude injunctive relief against the entry of such order. This contention assumes, without basis, that these are ordinary Commission proceedings begun *de novo* in good faith, and that they are not, as they are alleged to be, rooted in defendants' determination to reverse by administrative action a final decree already entered by a competent Court of Appeals.

If the averments of petitioner's complaint are taken at face value (as they must on review of a summary judgment for defendants), defendants' assumption is in-

valid, and the instant situation is one where the administrative agency has plainly exceeded its powers. Two appellate decisions, one by the Supreme Court and the other in the Fourth Circuit, clearly rebut defendants contention.

Deering-Miliken, Inc. v. Johnston, 295 F. 2d 856, 1961 (C.A. 4), presents an interesting parallel to the situation at bar because it involves a pertinacious resolve on the part of the administrative agency to find a respondent guilty despite a patent dearth of evidence. The same decision disposes of the contention that no real harm is done by repeatedly and indefinitely putting a respondent to his proofs in the administrative proceedings. In that case the National Labor Relations Board for the second time remanded a case against the plaintiff to its regional director to reprosecute a complaint. Plaintiff asked the District Court to enjoin the regional director from conducting the new hearing, citing Section 6(a) of the Administrative Procedure Act, 5 U.S.C. §1005(a), requiring "every agency [to] proceed with reasonable dispatch to conclude any matter presented to it . . .". In affirming the District Court's grant of the injunction, the Court of Appeals rejected the argument that judicial relief against administrative injustice is exclusively encompassed by the review provisions of the National Labor Relations Act. The Court said:

> "Here, however, there is no available administrative remedy. If hearings are held before a trial examiner pursuant to the second remand order, the plaintiff will have no right to attack the propriety of the Board's action in again remanding the case. Nor will it there have any effective right to assert its

contention that the second remand order and the holding of extended additional hearings pursuant to it constitute a present denial of its rights under §6 of the Administrative Procedure Act. Indeed, the Board does not here contend that there is any administrative remedy available to the plaintiff for the protection of the rights asserted. It contends only that the right may be ultimately asserted, after the delay is done, in a review proceeding under §10(e) or (f) of the National Labor Relations Act. *Those are judicial remedies which we have already found inadequate for the protection of the asserted right, and for that reason their existence does not foreclose invocation of the general jurisdiction of the district court."*

(Empasis supplied.)

Leedom v. Kyne, 358 U.S. 184, 79 S. Ct. 180, 3 L. Ed. 2d 210, 1958, even more forthrightly rejects the contention that statutory provisions for judicial review of administrative agency orders forecloses more direct relief in equity under proper circumstances. In that case the National Labor Relations Board, in violation of Section 9(b) of the Labor Relations Act, 29 U.S.C. §9(b), had included in a collective bargaining unit certain nonprofessional employees without the professional employees' consent, and had then illegally proceeded to hold an election looking to certification of the improperly composed unit as the employees' bargaining agent. The Board contended after being served with an equity suit seeking a judgment declaring the election results void, that the professional employees' sole remedy lay in their right to appellate review of their action under Section 10(f) of the Labor Relations Act, 29 U.S.C. §160(f). (These re-

view provisions are identical to those contained in Section 5(c) of the Federal Trade Commission Act on which the defendants have relied.) The Supreme Court disagreed with the Board:

> "The sole and narrow question presented is whether a Federal District Court has jurisdiction of an original suit to vacate [a] determination of the Board because made in excess of its powers . . . . We think the answer surely must be yes. This suit is not one to 'review', in the sense of that term as used in the Act, a decision of the Board made within its jurisdiction. Rather it is one to strike down an order of the Board made in excess of its delegated powers and contrary to a specific prohibition in the Act . . . . Plainly, this was an attempted exercise of power that had been specifically withheld. It deprived the professional employees of a 'right' assured to them by Congress. Surely, in these circumstances, a Federal District Court has jurisdiction of an original suit to prevent deprivation of a right so given."

Petitioner will discuss *Leedom v. Kyne and Deering-Milliken v. Johnston* later in this petition in connection with the contention that he has failed to exhaust his administrative remedies. For present purposes petitioner is satisfied that these cases support the view that the District Court's jurisdiction is not ousted by the availability of after-the-fact judicial review in the manner allowed under Section 5(c) of the Federal Trade Commission Act, 15 U.S.C. §45(c).

2. The Courts Below Have Grossly Erred in Allowing Dismissal of an Action of Great Public Importance Seeking To Enjoin Patently Illegal and Unfair Acts on the Part of the Federal Trade Commission

At the heart of the instant case lies the question of whether defendants' ostensibly new proceedings at their Docket 8520 are new in fact, or, as the complaint plainly avers (10a, 12a), amount to an illegal reinstitution of the Docket 6145 proceedings, without leave of the Court of Appeals for the Seventh Circuit, notwithstanding defendants' knowledge that the material facts leading to the prior decision have in no way changed. It is petitioner's position that the defendants have lawlessly violated the mandate of the Court of Appeals for the Seventh Circuit by having without that court's leave reinstituted their proceedings at Docket 6145 under the meretricious guise of new proceedings—in actuality not new at all—at their Docket 8520. This is shown by the pleadings on their face; moreover, it is axiomatic that on a motion for summary judgment all well pleaded facts, and all inferences reasonably to be drawn therefrom, are to be taken as true, and are to be liberally construed in favor of the party opposing the motion: *Poller v. Columbia Broadcasting System*, 368 U.S. 464, 82 S. Ct. 486, 7 L. Ed. 2d 458, 1962; *Henry v. Ford Motor Company*, 269 F. 2d 18, 1959 (C.A. 6); *Hiern v. St. Paul-Mercury Indemnity Company*, 262 F. 2d 526, 1959 (C.A. 5); *Alani: v. United States*, 257 F. 2d 108, 1958 (C.A. 10); *Snyder v. Hillegeist*, 249 F. 2d 649, 100 App. D.C. 368, 1957. Moreover, all doubt as to whether such a motion should be granted, is to be resolved against its proponent: *Booth v.*

Barber Transportation Company, 256 F. 2d 927, 1958 (C.A. 8).

The undenied averments of petitioner's complaint have included the following:

The express holding of the Court of Appeals for the Seventh Circuit in its judgment vacating defendants' cease and desist order, was that "plaintiff's methods of sale did not constitute a lottery for the reason that the ingredient of prize *was lacking*, and that said methods were not unlawful or violative of public policy as expressed in the [Federal Trade Commission] Act" (8a, emphasis supplied);

Petitioner's manner and methods of doing business have not substantially changed in any way since the above mentioned appeal was argued and decided—a fact which defendants know (10a);

Defendants' complaint at Docket 8520 "contains no new averments of substance of any kind" and "raises no issue which does not fall squarely within the ambit of the judgment and opinion of [the] Court of Appeals of April 3, 1957" (10a);

Defendants' complaint at Docket 8520 "reiterates in attenuated but substantially identical form the averments which defendants' predecessors in office had made at Commission Docket 6145" (10a).

In addition, a comparison of Exhibits "A" and "B" to petitioner's complaint shows the language to be for the most part identical. Petitioner suggests that there is a presumption that the same words used by the same party in the context of the same kind of proceeding, have the same meaning, even though used at different times.

A comparison of defendants' statement (42a) and petitioner's counterstatement (38a) of material facts as to which no genuine issue exists, again invokes the settled principle that a summary judgment is not to be entered where a bona fide dispute as to any relevant and material fact is shown: *Corley v. Life & Casualty Insurance Co.*, 296 F. 2d 449, App. D.C. , 1961; *United States v. United Marketing Association*, 291 F. 2d 851, 1961 (C.A. 8); *Bohn Aluminum Corp. v. Storm King Corp.*, 303 F. 2d 425, 1962 (C.A. 6). Some of the facts shown to be in dispute by comparing defendants' statement with petitioner's counterstatement have already been summarized in the statement of the case. For example, it was disputed whether the basis of the Seventh Circuit's decree had been (as defendants stated) that "the element of prize had not been established" by them (43a), or (as petitioner counterstated) that "plaintiff's method of doing business, in the light of a full record showing what that method was, did not in law constitute the sale of merchandise 'by means of a game of chance, gift enterprise, or lottery scheme', as the Commission had found" (60a). Other disputes centered on whether the same persons had been parties respondent to the Docket 6145 proceedings as are now respondents at Docket 8520 (44a, 61a, 63a); whether the administrative complaints related to conduct during different periods of time (44a, 61a); and (construing petitioner's pleadings and other papers in the light most favorable to him to which he is entitled in this posture of the case) whether there was any substantial or real difference between the averments of "game of chance, gift enterprise or lottery scheme" contained in both of the administrative complaints, and the words "chance or gaming device" contained in the second complaint.

The entire thrust of petitioner's complaint and other papers has been, it is clear, to demonstrate (1) the practical identity of defendants' prior complaint at Docket 6145 with its ostensibly new one at Docket 8520; (2) the fact that defendants have pressed the latter complaint against parties who had all been parties respondent to the prior proceedings; and (3) the fact that neither complaint specifies when or over what period of time the conduct complained of took place. These circumstances must be conceded to be true for purposes of deciding whether summary judgment has been properly entered. Thus, the question narrows to whether, such facts assumed, defendants' act in having in effect reinstituted their complaint at Docket 6145 without leave of the Court of Appeals for the Seventh Circuit, has violated that Court's mandate and is unlawful. The answer must be yes.

The statutory scheme for judicial review of Commission order, and the one actually followed in this case after the Commission at Docket 6145 had entered its cease and desist order, contemplates that "upon the filing of the record with it the jurisdiction of the court of appeals of the United States to affirm, enforce, modify, or set aside orders of the Commission shall be exclusive": Federal Trade Commission Act, Section 5(d), 15 U.S.C. §45(d). This section is held to vest continuing authority in the Court of Appeals to enforce the Commission's order through civil contempt proceedings if that order has been affirmed and is later disobeyed: *National Labor Relations Board v. Hopwood Co.*, 104 F. 2d 302, 1939 (C.C.A. 2); 1 Beer, Federal Trade Law and Practice (1942 ed.) 480, §178. In such circumstances the Commission's application to enforce its order through contempt proceedings "should

not be presented as a separate and independent proceeding but as ancillary to the original cause where the [Court of Appeals'] decree was entered: 1 Beer, op. cit., 484; *National Labor Relations Board v. Hopwood Co.*, supra.

Sauce for the goose is sauce for the gander. The continuing supervisory power of the Court of Appeals over the subject matter of the order which it has reviewed is, petitioner submits, equally present whether that order has been affirmed or set aside. This result is called for not only by considerations of mutuality and fundamental fairness, but also by the specific wording of subsection (i) of Section 5 of the Federal Trade Commission Act, 15 U.S.C. §45(i). This subsection in terms contemplates that the setting aside of a Commission order, as well as its affirmance, shall form the basis of the Court's mandate:

> "If the order of the Commission is modified *or set aside* by the court of appeals, and if (1) the time allowed for filing a petition for certiorari has expired and no such petition has been duly filed, or (2) the petition for certiorari has been denied, or (3) the decision of the court has been affirmed by the Supreme Court, then the order of the Commission rendered in accordance with the mandate of the court of appeals shall become final on the expiration of thirty days from the time such order of the Commission was rendered, unless within such thirty days either party has instituted proceedings to have such order corrected so that it will accord with the mandate, in which event the order of the Commission shall become final when so corrected."
>
> (Emphasis supplied.)

The foregoing makes even more clear the lawlessness of defendants' actions in this case. If they really believed that changed facts, changed considerations of public policy, or any other circumstances justify the reopening and the reinstitution of their Docket 6145 proceedings, the way was clear, and it was their duty, to petition the Court of Appeals for the Seventh Circuit for leave so to do, averring in support of their petition such facts as they believed. This petitioner would then have had an opportunity to answer that petition, and the matter could then have been judicially decided pursuant to conventional and accepted procedures. Defendants chose not to proceed in this proper way. By arrogating powers they do not have, and by abusing the vast authority which they do have, they elected summarily and of their own motion to begin to reverse the Court of Appeals' decision to which they are a party and by which they are bound.*

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* It is interesting to note that even though the defendants have claimed that they are not obliged to show cause or to obtain leave of any court before reopening the Docket 6145 proceedings judicially concluded against them in 1957, their own rules of practice require that cause to reopen a Commission proceeding be shown both when their cease and desist order has been affirmed on appeal, and when they have elected to dismiss their own complaint. Sub-section (b) of the Commission's Rules of Practice, ¶5.7, 16 C. F. R. §3.27(b), as numbered when this case began, provides:

> "In any case where an order to cease and desist issued by the Commission has become final by reason of court affirmance or expiration of the statutory period for court review without a petition for such review having been filed, the Commission may at any time *after reasonable notice and opportunity for hearing as to whether changed conditions of fact or of law or the public interest so require*, reopen and alter, modify or set aside, in whole or in part, its report of findings as to the facts or order therein whenever in the

Petitioner does *not* (as defendants urged below and urged here in connection with the application for stay) claim a perpetual immunity from Commission proceedings. His prayer for relief in the District Court, his position there, and his position here, is that defendants may petition the Court of Appeals for the Seventh Circuit to reinstitute the proceedings, assuming in that Court, as they must, the burden of showing cause to do so. The fact that defendants have not so petitioned that Court is mute evidence that no such cause exists.

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opinion of the Commission such action is required by said changed conditions or by the public interest."

(Emphasis supplied.)

Similarly, sub-section (c) of this section of defendants' rules provides (16 C. F. R. §3.27(c)):

"'After an order dismissing a complaint has been issued, the Commission may, *upon reasonable notice to the parties and opportunity for a hearing as to whether said proceeding should be reopened*, issue an order reopening such proceeding whenever, in the opinion of the Commission, changed conditions of fact or of law or the public interest so require."

(Emphasis supplied.)

Thus, while defendants in their rules concede that they are obliged to show cause to reopen closed administrative proceedings either after they have themselves dismissed those proceedings, or after an appellate court on review has *sustained* their order therein, they have taken the anomalous position in this case that no such obligation exists where the reviewing court has *vacated and set aside* such order. Quite obviously, defendants *do* have a duty to show cause in the latter circumstances; that duty runs to the court which has set their order aside.

3. Petitioner Should Have Been Allowed To Invoke Judicial Aid in a Sister Circuit in Order To Protect the Integrity of the Seventh Circuit's Judgment and To Preserve the Law of the Case by Which, Until That Circuit Court's Further Order, All Parties Remain Bound, Without Being Required First To Defend the Merits of Defendants' Lawlessly Reinstituted Proceedings

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In the light of petitioner's showing that defendants' reinstitution of their Docket 6145 proceedings violated the Seventh Circuit's mandate and was unlawful, there remains the question whether petitioner was nevertheless, as in the ordinary case where administrative proceedings are in progress, obliged to exhaust his administrative remedies before invoking judicial aid. Clearly, the answer should be no.

The doctrine of exhaustion of administrative remedies rests in substantial part on the principle that courts will not interfere with an administrative or quasi-judicial agency's authority to render a decision in a matter properly before it, where such interference will stultify the agency's discretion and expertise which peculiarly qualify it to decide that matter. This consideration is entirely lacking from the situation at bar. In this case *defendants have no discretion or expertise to exercise.* They should have dismissed their complaint at Docket 8520 as soon as petitioner so moved them, before suit in the District Court was instituted. That they have not done so, almost a year and a half later, is evidence not that they are taking their time to exercise a wise and beneficent discretion, but that they intend to persist in

their contumacious violation of the Court of Appeals' 1957 mandate.

Secondly, defendants have urged not the conventional doctrine of *exhaustion* of administrative remedies, but the novel doctrine of *reexhaustion*. They would require the petitioner, as an insatiable condition of judicial aid, to *re*exhaust the same administrative remedy which he so painstakingly pursued from 1953, when the complaint at Docket 6145 issued, to 1956, when the cease and desist order was finally entered. If this contention is upheld, defendants and their sister agencies will be empowered at will and whim to frustrate the finality and intendment of any order of a Federal appellate court which they find not to their liking, and to set at naught the entire system of orderly judicial review of agency action, by the meretricious device of instituting "new" complaints faintly variant in wording from prior ones.

The true answer to the contention of failure to exhaust administrative remedies, is found again, in the decisions in *Leedom v. Kyne*, supra, 358 U.S. 184, 79 S. Ct. 180, 3 L. Ed. 2d 210, 1958, and *Deering-Milliken, Inc. v. Johnston*, supra, 295 F. 2d 856, 1961 (C.A. 4). Already cited for the principle that statutory judicial review of the administrative decision does not oust or displace the District Court's equity jurisdiction to enjoin or otherwise invalidate the lawless proceedings before they are concluded, these cases stand equally for the principle that the administrative remedy, so-called, need not be exhausted where the right to equitable relief is plain. In both cases the court recognized that plaintiff *might* prevail on the merits by raising his contentions before the administrative tribunal and, if there unsuccessful, petitioning for review.

But in each case the court held the administrative remedy inadequate to the occasion—in *Leedom* because plaintiff had a right to have the illegal bargaining agent certificate invalidated before further harm arising from the illegality could ensue, in *Deering-Milliken* because the patent violation of the "reasonable dispatch" provisions of the Administrative Procedural Act would be aggravated, not cured, by requiring the plaintiff to exhaust his remedies before the Board.

Taken together, *Deering-Milliken* and *Leedom* stand for the principle that a respondent's right to be free of unjustified harassment in the form of administrative proceedings, *whether illegally reinstituted or illegally prolonged*, is a right which equity will help him obtain. This is so whether the suit is predicated, as here, on 28 U.S.C. §1337 and on diversity of citizenship, or, as in *Deering*, on Section 6(a) of the Administrative Procedure Act. Indeed, only the fact that defendants have assigned a new, rather than the old docket number to the proceedings which they have reinstituted, prevents that act from applying here.

Defendants should not be allowed to hide behind the shield of their public office to escape the rule of collateral estoppel which applies to ordinary judgments. As stated by this Court and repeated in 50 *C.J.S.*, §518, "Judgments", at page 372:

> "Where an administrative body is a party to litigation, the party adverse to the administrative body is entitled to rely on the conclusiveness of a judgment entered by a court to the same extent that other litigants may rely on judgments for or against them."

In *International Union of Mine, Mill & Smelter Workers v. Eagle-Pitcher Co.*, 65 S. Ct. 1166, 325 U.S. 335, 89 L. Ed. 1649, 1945, from which the statements quoted is taken, this Court held that under the National Labor Relations Act the Board "was not entitled, as of right, to have the decree it had procured set aside in part and the cause remanded after it had become final for trial de novo . . .". The instant case is the more compelling because defendants here did not even bother to seek leave of the Court of Appeals which has conclusively shaped the law of this case on which this petitioner has relied. In *Eagle-Pitcher* this Court held:

> "We are dealing here with a decree of a court entered in a judicial proceeding. The term at which the decree was entered has long since expired. The only recourse open to the Board is the same that would be open to any other litigant, namely, a bill of review."

Defendants' contention that their complaint at their Docket 8520 is "new" and therefore not subject to judicial scrutiny in an injunction proceeding, is incorrect for two other reasons. In the first place, even if the new administrative complaint constitutes in effect a new cause of action, defendants are still estopped by the familiar rules of the law of judgments from reopening those matters actually litigated and determined in the Docket 6145 proceeding: see 50 *C.J.S.*, "Judgments", §712, page 174. Moreover,

> ". . . where a former judgment is set up as a bar or estoppel, the question whether there is such an identity of the parties and of the subject matter or

cause of action as will support the plea of res judicata is a question of law for the court *when it is determinable from an inspection of the record alone; but if extrinsic evidence is required to effect the necessary identifcation, or to escape the effect of a judgment set up as a bar or estoppel, it becomes a question of fact and must go to the jury* unless the proof admits of only one conclusion . . ." (Emphasis supplied.)

(50 *C.J.S.*, "Judgments", §846, at p. 420.)

The complaint filed by your petitioner in the District Court clearly raises issues of fact as to the extent to which the "new" administrative proceeding duplicates the prior one; the summary dismissal of that complaint has deprived your petitioner of his opportunity to submit his proofs, including those intended to be adduced by discovery, to the fact-finding tribunal.

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4. The Lower Courts' Successive Failure To Inform Petitioner, by Opinion or Otherwise, of the Basis for Dismissal of His Suit, Constitutes or at Least Approaches a Deprivation of Due Process of Law

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As already set forth, defendants' motion to dismiss the complaint, or, alternatively, for summary judgment in their favor (45a), raised jurisdictional as well as non-jurisdictional defenses. Defendants contended in that pleading (1) that the court lacked jurisdiction over the subject matter, (2) that petitioner had failed to exhaust an adequate legal remedy, (3) that the complaint had failed to state a claim on which relief could be granted,

and (4) that there was no genuine issue of material fact, and that defendants were entitled to judgment as a matter of law. In their brief defendants amplified these assertions by contending not only that the mere pendency of Docket 8520 before them operated to oust the District Court's jurisdiction, but that petitioner's sole legal remedy had to await the conclusion of the Docket 8520 proceeding and consisted in petitioning the appropriate Court of Appeals for review under Secton 5(c) of the Federal Trade Commission Act.

Nothing in the actions of either the District Court or the Court of Appeals has furnished your petitioner with any indication as to which of the manifold contentions of defendants has been selected as the basis for the judicial action taken. Petitioner submits that an elmentary regard to considerations of fairness requires an explanation of judicial action to be given to the litigants either on the trial or on the appellate level. While it may be that Rule 52(a), F.R.C.P., does not in terms require findings of fact and conclusions of law in connection with the District Court's disposition of a motion of the kind filed by these defendants, the multiplicity of defendants' positions appears to have made the filing of an opinion highly desirable, even indispensable, for purposes of review.

Moreover, it is ironic to note that in its order (66a) of May 20, 1963, denying petitioner's request for stay of defendants' hand pending argument and disposition of the appeal, the Court of Appeals expressly stated that:

> ". . . the court concludes that it is impossible on the record thus far presented for the court to formulate a judgment with respect to said issue [whether

defendants' 'new' complaint was reiterative of the prior one]."

If it was "impossible" for the Court of Appeals on May 20, 1963, to reach a conclusion on that crucial issue, how did it become any more possible for that court, acting by a differently composed panel of its judges, to conclude that issue on December 6, 1963, when it affirmed the judgment below?

The conclusion is inescapable that your petitioner should have been, and should now be, apprised of the basis of the actions taken by the lower courts, and that the failure of those courts so to have done has at least approached a deprivation of due process of law guaranteed him by the Fifth Amendment.

G. CONCLUSION

This Court should grant the writ. Petitioner intends at the time this petition is filed, to file a motion for stay of defendant Commission's hand pending disposition of this petition.

Respectfully submitted,

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APPENDIX TO PETITION FOR WRIT OF CERTIORARI

Filed December 6, 1963

UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

September Term, 1963.

Civil 2787-62

No. 17,819

JOHN KASLOW, individually and t/a and d/b/a J. C. MARTIN CO. and the D. A. SALES COMPANY, *Appellant*,

v.

PAUL RAND DIXON, PHILIP ELMAN, EVERETTE MACINTYRE, SIGURD ANDERSON, and A. LEON HIGGINBOTHAM, JR., individually and collectively as the Federal Trade Commission, *Appellees*.

Appeal from the United States District Court for the District of Columbia.

Before: Bazelon, Chief Judge, and Washington and Bastian, Circuit Judges.

Judgment

This cause came on to be heard on the record on appeal from the United States District Court for the District of Columbia, and was argued by counsel.

On consideration whereof It is ordered and adjudged by this Court that the judgment of the District Court appealed from in this cause be, and it is hereby, affirmed.

Per Curiam.

Dated: Dec. 6, 1963